LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 29 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 916

LUCKENBACH STEAMSHIP COMPANY, INC., a corporation,
Appellant,

vs.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the District Court of Appeal, Third Judicial District, State of California

Appellant's Brief Opposing Appellee's Motion to Dismiss or Affirm

HART H. SPIEGEL
111 Sutter Street
San Francisco 4, California

GEORGE L. WADDELL
260 California Street
San Francisco 11, California

JOHN HAYS
260 California Street
San Francisco 11, California

DORR, COOPER & HAYS
260 California Street
San Francisco 11, California

Attorneys for Appellant

DUNCAN E. HAYNES
111 Sutter Street
San Francisco 4, California

BROBECK, PHLEGER & HARRISON
111 Sutter Street
San Francisco 4, California

Of Counsel

BORG PRINTING COMPANY OF CALIFORNIA, 150 FIRST STREET, SAN FRANCISCO 5

SUBJECT INDEX

	Page
Due Process	1
Interstate Commerce	6

TABLE OF AUTHORITIES CITED

Cases	Pages
Braniff Airways v. Nebraska Board, 347 U.S. 590 (1954)	4
Central Ry. Co. v. Pennsylvania, 370 U.S. 607 (1961)	3, 4, 5
Curry v. McCanless, 307 U.S. 357 (1939)	3
Greyhound Lines v. Mealey, 334 U.S. 653 (1948)	2
Guaranty Trust Co. v. Virginia, 305 U.S. 19 (1938)	3
James v. Dravo Contracting Co., 302 U.S. 134 (1937)	4
Lawrence v. State Tax Commissioner, 286 U.S. 276 (1932)	3
Northwestern Cement Co. v. Minnesota, 358 U.S. 450 (1959)	4
N. Y. ex rel. Cohn v. Graves, 300 U.S. 308 (1937)	3
Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940)	3, 4

Other Authorities	
Hartman, State Taxation of Corporation Income, 13 Vanderbilt Law Review 20 (1959)	6

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 916

LUCKENBACH STEAMSHIP COMPANY, INC., a corporation,
Appellant,

vs.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the District Court of Appeal, Third Judicial District, State of California

Appellant's Brief Opposing Appellee's Motion to Dismiss or Affirm

DUE PROCESS

Appellee's Motion to Dismiss or Affirm confirms that the basic due process issue in this case is what appellant said it was in its Jurisdictional Statement, viz., whether a state may validly tax income earned outside its boundaries merely because the place in which it is earned is not within the geographical boundaries of any taxing jurisdiction.

Appellee would eliminate territorial jurisdiction as a constitutional requirement for state income taxes and substitute

for it a requirement merely that the income be apportioned among taxing jurisdictions. Due process, says appellee, "requires no more" (Appellee's Motion to Dismiss, p. 9). Any doubt as to appellee's intentions is laid to rest at the point where appellee relegates this Court's "source of income" test to the function of a "useful tool only in relation to the division of income among various taxing jurisdictions." (Appellee's Motion, p. 15). Faced with the impossibility of denying that the effect of port day allocation is to tax income not earned within the territorial jurisdiction of the taxing state[1] appellee undertakes to redefine the words "extra-territorial" and "source" to give them special Alice-in-Wonderland meanings—as epitomized on page 14 of its Motion. Having first assumed that the accepted meaning of the phrase "source of income" will "create a vacuum with resultant tax immunity" (Appellee's Motion, p. 15), appellee seeks to change the concept of "source of income" and redefine it in terms of the results it wishes to achieve.

The answer to appellee's semantics is twofold:

First: Appellee has put the cart before the horse. The modern cases on apportionment *derive from* the constitutional doctrine of territorial jurisdiction to tax, so that apportionment is the "tool" and source of income the basic tenet, rather than vice versa. The type of reasoning employed by appellee is nothing but an exercise in verbalization, designed to support its own notion of territorial due process as preferable to present doctrine. Such a departure from established principles of constitutional law should not

1. Any doubt that transportation income is in fact earned outside the states at which the vessels call was removed by this court in *Greyhound Lines v. Mealey*, 334 US 653 (1948), in which this court held that if transportation takes place partly outside the states of termini the income is partly earned there.

be permitted in the absence of full consideration *by this Court* of the consequences thereof.

Second: Appellee's assumption that a tax "vacuum" will be created is in error in that it ignores the taxing power of the state of domicile. *Guaranty Trust Co. v. Virginia*, 305 U.S. 19 (1938); *N. Y. ex rel. Cohn v. Graves*, 300 U.S. 308, 313 (1937); *Lawrence v. State Tax Commissioner*, 286 U.S. 276, 280-1 (1932); *Curry v. McCanless*, 307 U.S. 357, 368 (1939)

It has been stipulated that California is not the state of domicile. Nor does appellee dispute the fact that California gives no protection, opportunities or benefits to appellant's property and activities while they are on the high seas; indeed, it is a premise of appellee's argument that *no* non-domiciliary state affords protection, opportunity and benefit on the high seas. However, appellee purports to construe *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940) as extending the taxing power of non-domiciliary states to include such non-protected income. Reason as well as the language of the opinion reject such a construction.[2]

In advancing its tax vacuum argument, appellee reasons that income having no jurisdictional connection with *any* non-domiciliary state is not subject to taxation by the state of domicile, but may, rather, be divided among and taxed by such non-domiciliary states. But this Court has rejected such an approach. Thus, in *Central Railway Co. v. Pennsylvania*, 370 U.S. 607 (1961), this Court held that if no opportunities, protections and benefits whatsoever are afforded by a non-domiciliary state, "it is surely appropriate to presume that the domicile is the only State affording the 'oppor-

2. Appellee, in order to achieve the interpretation it advocates, gratuitously interpolates, at page 11 of its Motion, the words "in relation to the total amount of protection, benefits and opportunities afforded."

tunities, benefits, or protection' which due process demands as a prerequisite for taxation" (Id. p. 612), and accordingly, only the state of domicile may impose a tax.

A case applying this principle to a situation such as is here involved is *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937).[3] In that case, this Court held that where the entire jurisdiction over an enclave has been ceded to the federal government and thus no power to afford opportunity, benefit or protection is retained, no state—other than the state of the taxpayer's domicile—may tax income earned within the enclave. For, as this Court held a non-domiciliary state "would have no jurisdiction to tax". (*Id.* p. 140).

Clearly, California provides no protection or benefit to appellant while the latter operates on the high seas, and has no connection or nexus with the income there earned.[4] Accordingly, contrary to appellee's position, California does not create taxing power in itself merely by showing that no

---

3. Appellee has never, throughout the entire course of this litigation, distinguished the *Dravo* case or demonstrated in any manner that it does not pass upon the precise legal issue here involved or that it is not squarely against the legal position appellee now assumes. On the contrary appellee seeks refuge in *Northwestern Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), a case which dealt with income derived wholly from sources within the jurisdiction of the taxing states thus not involving the problem present here; moreover the quotation by appellee is from a discussion of the requirements of the commerce clause—not the due process clause which is in issue here. (The only other case cited by appellee is *Braniff Airways v. Nebraska Board*, 347 U.S. 390, (1954) a case in which the allocation formula—the sole issue here—"was not in controversy", as appellee expressly concedes—Appellee's Motion pp. 12-13).

4. The United States government affords some protection and benefits to appellant's activities and property on the high seas. However, it should be immaterial whether appellant gets some protection from the United States or operates on the high seas without any protection from anyone. In either case, for California to levy a tax as if it afforded some protections, benefits and opportunity, when in fact it does not, violates the principle of due process as set forth in *J. C. Penney* and *Central Railway*.

other non-domiciliary state has any more nexus or connection than it does. For, as *Central Railway Co.* demonstrates, such a showing establishes that the *domiciliary* state has power to tax this income.

Hypothetical examples of operations at sea near the state border or just outside the three-mile limit are irrelevant.

Appellee sets forth hypothetical examples of operations at sea but near the taxing state in an effort to produce an intuitively unfavorable reaction to the principles of territorial due process. (Appellee's Motion pp. 13-14) Such cases are indeed likely to produce such a reaction, but this is because of the feeling that operations close to shore are actually to some extent dependent upon the nearby state. The fact is that the three-mile limit is itself arbitrary. The line must be drawn some place; three miles was the distance chosen. But from the fact that there may be difficulty in making a rational justification for the precise placement of the line it does not follow that fishing operations carried on just outside the three-mile limit are to be equated with steamship operations carried on off Australia or Peru by ships which also call at California. We are concerned here with the world-wide operations of a major steamship company. To attribute to the State of California protection to taxpayer's ocean-going freighters while they are in the North Sea or Indian Ocean merely because it may be possible to attribute some small degree of protection to a crab fleet four miles off the California coast is to posit that the courts cannot cope with differing factual situations. Every legal principle involves close and difficult cases at its outer limits, but this has not prevented the courts from formulating and administering rules of general application.

INTERSTATE COMMERCE

As to the commerce clause issue, appellee has not answered appellant's argument that port day allocation involves the risk of multiple taxation in view of California's inability to require other states to adopt its method of allocation. Contrary to appellee's assertion at page 18 of its Motion, appellant's argument is not "based on the assumption that *appellee* might use some other hypothetical formula" (emphasis added). Rather, it posits that some other state, not subject to appellee's control, may do so. Moreover, appellee's argument that a risk of multiple taxation is not in and of itself a sufficient basis to strike down a tax is contrary to the weight of authority (see Appellant's Jurisdictional Statement, p. 16) and wholly unsound in its application. See generally, *Hartman, State Taxation of Corporate Income*, 13 Vanderbilt Law Reveiw 20, 39-40 (1959)

Respectfully submitted,

HART H. SPIEGEL
111 Sutter Street
San Francisco 4, California

JOHN HAYS
260 California Street
San Francisco 11, California

Attorneys for Appellant

GEORGE L. WADDELL
260 California Street
San Francisco 11, California

DORR, COOPER & HAYS
260 California Street
San Francisco 11, California

DUNCAN E. HAYNES
111 Sutter Street
San Francisco 4, California

BROBECK, PHLEGER & HARRISON
111 Sutter Street
San Francisco 4, California

Of Counsel